SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

NO._____

ELIZABETH ROSPIGLIOSI,

Petitioner,

vs.

DUDLEY J. CLOGHER,

Respondent.

BRIEF OF PETITIONER

INTRODUCTION

Part of this brief will be a repetition of matters alleged in the Petition for Writ of Certiorari. This cannot be avoided without loss of clarity. Every effort has been made to make the same brief.

STATEMENT OF CASE

The respondent was the Manager of the Miami, Florida, office of BACHE & CO., a member of the New York

Stock Exchange. (Answer of respondent to counterclaim—Tr. 28, Par. 4). The petitioner had a stock account with Bache & Co., and agreed with respondent to share profits in said account with him in consideration of his experience and service in managing and directing said account, petitioner to furnish all capital. (Bill of Complaint of respondent—Tr. 5, Par 9). A rule of the New York Stock Exchange expressly prohibited the respondent from making this contract. (Rule Tr. 76). Any waiver by petitioner of compliance with this rule was declared void by 15 U.S.C.A. 78cc (a). The petitioner signed a written acknowledgment that she owed respondent approximately $38,400.00 under said contract to share profits. (Tr. 9). She paid part of this and the respondent recovered a money judgment for the balance in the principal sum of $18,700.00 which, together with interest, as allowed in said judgment, brought the said judgment to approximately $24,700.00 (Tr. 58, Par. 5). This judgment was affirmed by the Supreme Court of Florida. (Tr. 74). Review of this judgment of affirmance is sought by the petitioner for writ of certiorari in this cause on the ground that the judgment is based upon a contract void or unenforceable under the Securities Exchange Act of 1934. (15 U.S.C.A. 78a). The Supreme Court of Florida in its opinion, Thomas, J. held the act last cited was not applicable to said contract. (Tr. 69). This opinion of the Supreme Court of Florida is reported at 46 So. 2d. 170.

BASIS OF JURISDICTION

Jurisdiction is invoked under Title 28, U. S. Code Section 1257. The same is discussed and authorities cited under the same heading in the Petition for Writ of Certiorari.

ASSIGNED ERROR

The Supreme Court of Florida erred in its mandate (Tr. 74) and opinion (Tr. 68) in holding that the Securities Exchange Act of 1934 (15 U.S.C.A. 78a et seq) or any part thereof did not render unenforceable the contract between petitioner and respondent, which mandate affirmed the final decree (Tr. 56) of the Circuit Court of Dade County, Florida, containing a money judgment against the petitioner based on said contract in the aggregate sum of approximately $24,700.00.

The petitioner contended before both courts that the contract upon which the money judgment was based was unenforceable under the said act.

ARGUMENT

1. Summary of Argument

A New York Stock Exchange rule (Tr. 76) prohibited the respondent from receiving any of the profits of the stock account of petitioner. The judgment for respondent sought to be reviewed was based upon the failure of petitioner to pay profits to respondent from said account as agreed, and was itself a judgment for unpaid profits made from said account. The Securities Exchange Act of 1934 was passed to regulate Securities Exchanges, and the dominant purpose of the act was to insure the maintenance of fair and honest markets in transactions of securities through exchanges. Said act made the filing of copies of all rules of an exchange and the filing of an agreement to furnish copies of any amendments to such rules with the Securities and Exchange Commission, a condition pre-

cedent to the registration of an exchange with such Commission. Said act made it mandatory that said commission register said exchange when it had made certain determinations, among which was a determination that the rules of said exchange were just and adequate to insure fair dealing and to protect investors. The said commission registered the New York Stock Exchange, thereby determining that the rules of said exchange were of that kind. The said rule of said exchange is on its face a just rule, a rule to insure fair dealing, and a rule to protect investors. Said rule must necessarily have been determined to be such by the commission when it granted registration to said exchange. The said act makes void any provision to waive compliance with said rule of said exchange, and makes void any contract violating the act itself or any rule thereunder. The effect of this act is to either give to said rule of said exchange the force of law, or to create a public policy of which the said rule is a part. If said rule has the force of law under said act, then the contract violating the same upon which the judgment is based becomes void under the terms of said act. If said rule is a part of public policy made by said act, then the said contract violating it is unenforceable. In either event, the judgment of the Florida Supreme Court affirming the money judgment of the Circuit Court of Dade County, Florida, which was based upon a contract violating the said rule of said exchange, should be reversed.

2. Question Involved.

Is a contract between a customer of a member of the New York Stock Exchange, who has an account with such member, and a registered employee of such member, to share the profits of such account, void or unenforceable

under 15 U.S.C.A. 78cc of the Securities Exchange Act of 1934, because made in violation of a rule of said exchange prohibiting such a contract ?

The manner in which, and the time at which this question was raised in the Circuit Court of Dade County, Florida, and before the Supreme Court of the State of Florida, has been set up specifically in the Petition for Writ of Certiorari.

3. Argument Proper

This argument follows the summary above, and gives the same in detailed form. The New York Stock Exchange rule (Tr. 76) which prohibited the respondent from receiving any of the profits of the stock account of petitioner was as follows:

> "5. Interests in Customers' Accounts. No registered employee shall, directly or indirectly, take or receive a share in the profits of any customer's account, or share in any losses sustained in any such account."

The Securities Exchange Act of 1934 was passed to regulate securities exchanges, and the dominant purpose of the act was to insure the maintenance of fair and honest markets in transactions of securities through exchanges. A portion of 15 U.S.C.A. 78b. reads as follows:

> "Necessity for regulation
>
> "For the reasons hereinafter enumerated, transactions in securities as commonly conducted

upon securities exchanges and over-the-counter markets are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto, including transactions by officers, directors, and principal security holders, to require appropriate reports, and to impose requirements necessary to make such regulation and control reasonably complete and effective, in order to protect interstate commerce, the national credit, the Federal taxing power, to protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of fair and honest markets in such transactions:"

Said act made the filing of copies of all rules of an exchange and the filing of an agreement to furnish copies of any amendments to such rules with the Securities and Exchange Commission, a condition precedent to the registration of an exchange with such commission. 15 U.S.C.A. 78f (a) (3 and 4) reads as follows:

"Registration of national securities exchanges

"(a) Any exchange may be registered with the Commission as a national securities exchange under the terms and conditions hereinafter provided in this section, by filing a registration statement in such form as the Commission may prescribe, containing the agreements, setting forth the information, and accompanied by the documents, below specified:

"(3) Copies of its constitution, articles of incorporation with all amendments thereto, and of its existing bylaws or rules or instruments corresponding thereto, whatever the name, which are hereinafter collectively referred to as the "rules of the exchange"; and

"(4) An agreement to furnish to the Commission copies of any amendments to the rules of the exchange forthwith upon their adoption."

Said act also made it mandatory that said commission register said exchange when it had made certain determinations, among which was a determination that the rules of said exchange were just and adequate to insure fair dealing and to protect investors. 15 U.S.C.A. 78f (d) reads as follows:

"(d) If it appears to the Commission that the exchange applying for registration is so organized as to be able to comply with the provisions of this chapter and the rules and regulations thereunder and that the rules of the exchange are just and adequate to insure fair dealing and to protect investors, the Commission shall cause such exchange to be registered as a national securities exchange."

A portion of 15 U. S. C. A. 78cc reads as follows, to-wit:

"Validity of contracts

"(a) Any condition, stipulation, or provision binding any person to waive compliance with any

provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.

"(b) Every contract made in violation of any provision of this chapter or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this chapter or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, or regulation:"

The purpose of Congress in passing an act is the dominant factor in determining its meaning, and where it is susceptible to two opposed interpretations, that interpretation which effectuates rather than frustrates such purpose should be adopted. Chief Justice Vinson in the case of Shapiro v. United States, 335 U. S. 1, 68 S. C. 1375, 92 L. E. 1787, used the following language:

"For, in construing statutory immunities in such circumstances, we must heed the equally

> well-settled doctrine of this court to read a statute, assuming that it is susceptible of either of two opposed interpretations, in the manner which effectuates rather than frustrates the major purpose of the legislative draftsman."

In United States v. Congress of Industrial Organizations, 335 U. S. 106, 68 S. C. 1349, 92 L. E. 1849, the court said:

> "The purpose of Congress is a dominant factor in determining meaning. There is no better key to a difficult problem of statutory construction than the law from which the challenged statute emerged."

One of the chief purposes of the Securities Exchange Act of 1934, was to insure the maintenance of fair and honest markets in transactions in securities. Another purpose of said act was to protect investors by forcing exchanges to pass rules for their protection. The said rule of the New York Stock Exchange was passed to carry out the purpose of the act. To hold that 15 U.S.C.A. 78cc (a) applied to the petitioner in such manner that she could not legally waive her right to have the respondent comply with the said rule of said exchange, but did not apply to the respondent in such manner as to require him to comply with said rule, would be to deny to the petitioner the very protection the statute was passed to give, and would frustrate one of the purposes of the act.

Any reasonable construction of 15 U.S.C.A. 78cc (a) would be that the same was passed to make compliance with any rule of an exchange therein mentioned manda-

tory regardless of the action of any person the statute was passed to protect. It follows as a logical consequence that the said rule of said exchange is thereby given the force of the act itself, and any contract made in violation thereof would be void under 15 U.S.C.A. 78cc (b) which makes a contract in violation of the act itself void.

In Weil vs. Neary, 278 U. S. 160, 49 S. C. 144, 73 L. E. 243, it was held that a contract made in violation of a court rule passed under a statute authorizing the same, was void. Chief Justice Taft who wrote the opinion used the following words:

> "It is clear that a rule of court thus authorized and made has the force of law."

He also used the following words in said opinion:

> "Enforcement of such contracts, when actual evil does not follow, would destroy the safeguards of the law, and lessen the prevention of abuses."

The said rule of said exchange under said last opinion has the force of law under the Securities Exchange Act of 1934, for the passage of a rule of such kind, and the determination by the Securities and Exchange Commission that said rule was of such kind, were made conditions precedent to the doing of business by the said exchange.

If 15 U.S.C.A. 78cc (a) is not given such construction or interpretation as to give said rule of said exchange the force of law, then in order to give said statute any effect at all it must be construed to establish the said rule of said exchange as one of public policy.

In Muschany v. United States, 324 U. S. 49, 65 S. C. 442, 89 L. E. 744, this court used the following words:

> "Public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests."

In Hurd v. Hodge, 334 U. S. 24, 68 S. C. 847, 92 L. E. 1187, this court used the following words:

> "The power of Federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents."

The conclusion is inescapable that the contract upon which judgment sought to be reviewed is based, was void as a violation of the Securities Exchange Act of 1934, or unenforceable as against public policy created by the said act.

4. Opinion of the Supreme Court of Florida.

Justice Thomas in his opinion for the Supreme Court of Florida gave several reasons why the said Securities Exchange Act of 1934 did not affect the violation of said rule of said exchange. One reason was that 15 U.S.C.A. 78cc (a) applied only to rules of exchanges required by the act, and the said rule of said exchange was not required by the act. This has been answered in this brief above. An exchange could not do business under the act until rules of a kind designated in the act were passed, and until the Securities and Exchange Commission had deter-

mined that the rules passed by the exchange were of that kind designated by the said act. The said rule of said exchange was of that designated kind, and the Securities and Exchange Commission so determined. It necessarily must have been required by the act.

Another reason given in said opinion of the Supreme Court of Florida was that 15 U.S.C.A. 78cc (a) made void any stipulation binding any person to waive compliance with the said rule of said exchange, and, notwithstanding the contract of petitioner with respondent to share profits, which was prohibited by the said rule, the record showed no such binding stipulation. The answer to this, of course, is if there was no waiver of compliance with the said rule on the part of the petitioner, then she is entitled to all of her rights which flowed to her as a legal consequence of the violation of the said rule by the respondent, and such legal consequence of such violation has been fully discussed in this brief above.

And the final reason given in the opinion of the Supreme Court of Florida was as follows, to-wit:

> "Lastly, we cannot ignore the statement in the appellant's brief that the purpose of this rule was the protection of herself as a customer. This but emphasizes our thought that she was not bound to make any waiver even if such a waiver applied to a rule under the act or a rule of the exchange required by the act, but she voluntarily entered into a business venture with a man with whom she proposed to carry out the marriage relationship and, contrary to any idea that unfair advantage was taken of her or that she was victimized,

> she actually benefited by the enterprise and now seeks to retain more than her share of the profits."

The Court answered the argument of petitioner that said rule of said exchange was passed for her protection by saying that she was not bound to waive her rights under the said rule, but did so voluntarily in that she actually benefited by the enterprise. Of course, if she voluntarily waived her rights under said rule such a waiver would be void under the express words of said act, and the contract itself would be void regardless of the said rule or the said act if the petitioner did not enter into it voluntarily. The argument that she was not bound to waive her rights under said rule has been answered above. Whether or not the petitioner acted voluntarily is no answer to the argument that said rule was passed for the protection of the petitioner, being one of the purposes of the act, and is no argument at all to show that respondent should be released from the legal consequences of his act in violating said rule.

The reference to the marriage relationship between petitioner and respondent (the Final Decree sought to be reviewed found that "no valid marriage has ever existed between said parties." Tr. 58) was wholly irrelevant to the question.

The fact that petitioner was benefited through the violation of said rule by respondent is no reason to relieve respondent of the legal consequences of his act. Weil v. Neary, supra, so held. The violation of a rule with the force of law or the doing of an act contrary to public policy, cannot be excused by saying such a violation or act

conferred a benefit upon the one whom the rule or public policy was formed to protect.

CONCLUSION

The Securities Exchange Act of 1934 gave to the said rule of the said exchange the force of law, and the violation of the same is equivalent to a violation of the act itself. If the said rule of said exchange does not have the force of law, then, to say the least, the said act has made the said rule one of public policy. In either event the contract made by the respondent in direct violation of the said rule of said exchange upon which is based the judgment sought to be reviewed, is unenforceable, and said judgment should be reversed.

Respectfully Submitted,

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THE SUPREME COURT OF THE UNITED STATES

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NO. 269

ELIZABETH ROSPIGLIOSI,

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Respondent.

BRIEF OF RESPONDENT ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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THE OPINION BELOW

The opinion below is the case of ROSPIGLIOSI v. CLOGHER, —— Fla. —— (not yet reported in State Reports), 46 So. 2d. 170 (Tr. 68).

JURISDICTION

Petitioner as a basis for jurisdiction relies upon Title 28 United States Code, Section 1257. Respondent in reply says that the judgment of the State Court could have rested either upon (1) the applicability or non-applicability of a federal statute to certain facts, or (2) a general principle of non-federal law, and that no federal question or federal statute was necessarily involved so that this Court has no jurisdiction. Respondent further contends that there are no "special and important reasons" as required by Supreme Court Rule 38, paragraph 5, for granting a writ of certiorari and that the State Court has not "decided a federal question of substance" as specified in subparagraph (a) of said Rule 38, paragraph 5.

STATEMENT OF CASE

This cause comes up on a petition for a writ of certiorari to the Supreme Court of Florida, which Court affirmed a final decree of the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, in Chancery, which final decree denied a prayer for divorce, but granted a money judgment to the plaintiff, Dudley J. Clogher, upon an account stated between the plaintiff and the defendant in the form of a written partnership dissolution and settlement agreement (Tr. 56). The plaintiff, Dudley J. Clogher, who is the respondent here, filed his bill of complaint against the defendant, who is the petitioner here (Tr. 1). The bill alleged that the parties were common law man and wife, that the defendant had been guilty of desertion and extreme cruelty, that the parties had heretofore been partners under an oral partnership agreement (Tr. 5), and that said partnership agreement

had been dissolved by a written dissolution and settlement agreement entered into between the parties (Tr. 6, 9), that said dissolution and settlement agreement (Tr. 9) provided in effect that the defendant was indebted to the plaintiff in the sum of $38,400.00, that a payment of $19,700.00 has been made, and that the defendant was indebted to plaintiff in the sum of $18,700.00 (Tr. 6, 7). The bill prayed that the court decree that a common law marriage exists between the parties, that a divorce be decreed, that the court order and decree that a valid partnership heretofore existed between the parties, and that the court decree that the defendant is indebted to the plaintiff in the sum of $18,700.00 as said balance due under said written dissolution of partnership agreement acknowledging said indebtedness (Tr. 8). There were other matters and prayers in the bill not relevant here.

The defendant filed an independent suit in equity against the plaintiff, and the two suits were consolidated (Tr. 10, 12). Ultimately the defendant filed her amended answer in which she denied the common law marriage and denied she ever entered into a partnership agreement with the plaintiff, but alleged fraud on the part of the plaintiff (Tr. 13). The defendant also filed a second amended counterclaim or cross-bill, in which she accused the plaintiff of fraud, added certain new parties defendant and prayed for an accounting against the plaintiff and said new parties defendant (Tr. 19).

In her ultimate pleadings, which were said amended answer (Tr. 13) and said second amended counterclaim or cross-bill (Tr. 19), the defendant did not plead a violation of any rule of the New York Stock Exchange, and did not raise any point as to the validity of the partnership con-

tract between the parties, but at the hearing before the special master defendant introduced in evidence defendant's Exhibit W, being a rule of the New York Stock Exchange to the effect that no registered employee shall take or receive a share in the profits of any customer's account (Tr. 76).

The special master found that the provisions of Title 15 U.S.C.A. Sec. 78cc, sub-section (b) did not make the partnership agreement void, since said provisions did not apply to the rules of a stock exchange (Tr. 48). The master also found that the contract was fully performed and that "even an illegal transaction, when consummated and fully executed, the money or thing which was the price of it may be a legal consideration between the parties." (Tr. 49). The lower court expressly confirmed the master's report (Tr. 58).

The Circuit Court in its final decree found that no valid common law marriage existed, and denied the prayer for divorce (Tr. 58). The decree further found that no fraud was practised by the plaintiff upon the defendant (Tr. 58), and the decree awarded a judgment in favor of the plaintiff and against the defendant in the sum of $18,700.00, together with interest thereon at 6% per annum from October 1, 1945, based upon the settlement or account stated contained in said partnership dissolution agreement (Tr. 57, 58). The Supreme Court of Florida by its mandate affirmed the decree of the lower court without any change or modification thereof (Tr. 74), and the defendant filed in this court her petition for writ of certiorari.

SUMMARY OF ARGUMENT

Point A:

The judgment of the state court could have rested upon either of two independent grounds, one of which was federal and the other non-federal in character, and the non-federal ground was sufficient to sustain the judgment, so that this court has no jurisdiction.

Point B:

No federal question is involved, since, even if the original partnership agreement violated a federal statute, this would be immaterial because the contract has been fully executed and an account stated between the parties.

Point C:

Even if a federal question is involved, it is not a question of any substance, and there are no special or important reasons for granting a writ of certiorari.

Point D:

The federal statute relied upon by petitioner does not render invalid a contract merely because the contract is contrary to a rule of a private stock exchange.

ARGUMENT

POINT A

THE JUDGMENT OF THE STATE COURT COULD HAVE RESTED UPON EITHER OF TWO INDEPENDENT GROUNDS, ONE OF

WHICH WAS FEDERAL AND THE OTHER NON-FEDERAL IN CHARACTER, AND THE NON-FEDERAL GROUND WAS SUFFICIENT TO SUSTAIN THE JUDGMENT, SO THAT THIS COURT HAS NO JURISDICTION.

This is not a suit to enforce a partnership agreement or to collect damages for the violation thereof. The partnership agreement was fully executed and the partners made a profit of approximately $150,000.00 out of the partnership venture (Tr. 43). The petitioner had in her hands not only her share of the profits but $38,400.00 of the profits belonging to respondent. The parties entered into an agreement which was a settlement agreement dissolving the partnership, and in this agreement petitioner acknowledged that she was indebted to respondent in the sum of $38,400.00. A payment reduced the indebtedness to $18,700.00.

The special master found that the respondent was indebted to petitioner in the sum of $18,700.00, first, because the federal statute above referred to did not cause the oral partnership agreement to be void (Tr. 48) and, second, because the contract was fully executed and therefore plaintiff was entitled to the balance of the amount agreed to be due him by the dissolution and settlement agreement even if the partnership agreement had been void (Tr. 49). The first of said two reasons might have been based on a federal question, but the second reason was based on a non-federal question depending upon general law.

The lower court expressly confirmed the master's report without change or modification (Tr. 58), and the

Supreme Court of Florida by its mandate affirmed the lower court without change or modification (Tr. 74). Consequently, the judgment of the state court rested upon two independent grounds, one of which was a federal ground and one a non-federal ground.

The law seems to be well settled that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, the jurisdiction of the Supreme Court of the United States fails if the non-federal ground is independent of the federal ground and adequate to support the judgment, even though the non-federal question was decided erroneously by the state court.

FOX FILM CORPORATION v. MULLER, 296 U.S. 207, 56 S. Ct. 183, 80 L.Ed. 158, 159;

RADIO STATION WOW INC. v. JOHNSON, 325 U.S. 120, 65 S.Ct. 1475, 89 L.Ed. 2092, 2100;

HALE v. AKERS, 132 U.S. 554, 10 S.Ct. 171, 33 L.Ed. 442;

CUYAHOGA RIVER POWER CO. v. NORTHERN REALTY CO., 244 U.S. 300, 37 S.Ct. 643, 61 L.Ed. 1153;

NEW YORK EX REL DOYLE v. ATWELL, 261 U.S. 590, 43 S.Ct. 410, 67 L.Ed. 814;

JENKINS v. LOEWENTHAL, 110 U.S. 222, 3 S.Ct. 638, 28 L.Ed. 129.

Unless it appears that a decision of a federal question was necessarily involved in the judgment of the state court and that the judgment of the state court could not have been rendered without a decision of the federal question, the Supreme Court of the United States has no jurisdiction to review the judgment of the state court.

BROWN v. ATWELL, 92 U.S. 327, 23 L.Ed. 511, 512;

SMITH v. ADSIT, 16 Wall. 185, 21 L.Ed. 310.

The judgment was rendered for the respondent on two grounds, one being that the federal statute in question did not declare the original partnership agreement void, and the other being that under the general law one may recover on an account stated after a contract is fully executed, even though the contract was originally void. The non-federal ground was an independent ground sufficient to sustain the judgment. Therefore, this court has no jurisdiction even if the state court erroneously decided the non-federal question. No federal question was necessarily involved in the state court's decision, since it could have rested on the non-federal question alone. Even if the Supreme Court should differ with the state court on its decision on the non-federal question this would not give the Supreme Court jurisdiction.

POINT B

NO FEDERAL QUESTION IS INVOLVED, SINCE, EVEN IF THE ORIGINAL PARTNERSHIP AGREEMENT VIOLATED A FEDERAL STATUTE, THIS WOULD BE IMMATERIAL BECAUSE THE CONTRACT HAS BEEN FULLY EXECUTED AND AN ACCOUNT STATED BETWEEN THE PARTIES.

The partnership agreement between the parties was an agreement to share the profits and losses but respondent had no interest in the original partnership assets or capital. The original oral contract of partnership was fully executed, large profits were made, the profits were in the possession of the petitioner, the partnership was dissolved, an accounting was had and a written settlement made in which petitioner acknowledged a specific amount due to respondent and agreed in writing to pay said amount to respondent. The judgment for $18,700.00 represents a portion of the profit earned by the partnership, the respondent claiming no portion of the original partnership, assets or original investment.

This is not a suit upon the original partnership agreement or to enforce the partnership agreement, but a suit upon an account stated and an agreement to pay money after the partnership agreement was fully executed. Even if a violation of a rule of a stock exchange would have invalidated the partnership contract, which conclusion we vigorously deny, still after the contract has been fully executed, petitioner cannot keep the fruits and profits of the contract and refuse to pay respondent the amount which by an account stated she admitted to be due to him.

It is our position that if one of the parties to an executed illegal and unenforceable contract, who has received profits under it, admits that a specific sum is due to the other party, then the latter may maintain an action on an account stated between them or upon a specific promise to pay the amount due.

In the case of CENTRAL LABOR COUNCIL OF TACOMA v. YOUNG (Wash. 1925), 240 P. 919, it appeared that the parties entered into a contract for the holding of a Labor Day celebration. The contract provided for the sale of coupon tickets entitling purchasers to chances on prizes, and this was illegal, because it provided for a lottery. After the celebration the parties met to settle their affairs and a final accounting was reached whereby it was agreed that the appellants (defendants) were then indebted to the respondent (plaintiff) in the sum of $316.26. The respondent agreed to accept that sum in full settlement of the debt and the appellants agreed to pay it. The amount not having been paid, this action was begun to recover it. From a judgment in respondent's (plaintiff's) favor, appellants appealed and claimed that the contract was illegal and that no recovery could be had. In affirming the lower court, the Supreme Court of Washington said:

> "But this court long ago committed itself to a contrary doctrine and has established the rule that, where an illegal contract has been fully performed, the illegality is no defense to an action brought upon a subsequent promise to pay over the balance in the hands of one of the parties to the original contract."

The Supreme Court of the United States has announced the same principle as that laid down in said Young case. In PLANTERS' BANK v. UNION BANK, 16 Wall. 483, 83 U.S. 483, 21 L.Ed. 473, at page 479, the court said:

> "Such a contract would have been illegal. But when the illegal transaction has been consum-

> mated; when no court has been called upon to give aid to it; when the proceeds of the sale have been actually received, and received in that which the law recognizes as having had value; and when they have been carried to the credit of the plaintiffs, the case is different. The court is there not asked to enforce an illegal contract. The plaintiffs do not require the aid of any illegal transaction to establish their case. It is enough that the defendants have in hand a thing of value that belongs to them. Some of the authorities show that, though an illegal contract will not be executed, yet, when it has been executed by the parties themselves, and the illegal object of it has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise, express or implied, and the court will not unravel the transaction to discover its origin."

This Planters' Bank case was cited with approval by the special master in his report (Tr. 49).

The case of BROOKS v. MARTIN, 2 Wall. 70, 69 U.S. 70, 17 L.Ed. 732, was a suit in equity to set aside a contract by which plaintiff had sold his interest in a partnership venture and for an account of the partnership funds, the parties having a partnership agreement for the purchase from returning soldiers from the Mexican War of bounty land warrants and treasury script that might be issued by the government. A statute expressly provided that the sale of such rights prior to the issuance of the warrants was null and void. The Supreme Court stated that the partnership contract was clearly void as against public

policy. The partnership contract had been carried out and a defense was asserted that, since the funds arose from the illegal contract, the plaintiff should not be allowed to recover. The court decided that the partner who held the profits could not refuse to divide them on the ground of the illegal character of the original contract.

In OIL, INC. v. MARTIN, 381 Ill. 11, 44 N.E. (2d) 596, at 600, the Supreme Court of Illinois said:

> "The rule has been laid down and followed that a partner or one occupying a position of trust and confidence, may not, by reason of the fact that money may have been earned out of an illegal transaction, be released from making an accounting for his associate's share, when all of the proceeds have fallen into his hands. Brooks v. Martin, 2 Wall. 70, 69 U.S. 70, 17 L.Ed. 732. The court there points out there is a difference between enforcing an illegal contract and asserting title to money which has arisen from it."

There are many other authorities in the United States to the same effect. Among them are:

FLOYD v. PATTERSON,
72 Tex. 202, 10 S.W. 526;

CENTRAL REPUBLIC TRUST CO. v. EVANS,
378 Ill. 58, 37 N.E. (2d) 745;

EDWARDS v. EDWARDS,
108 Okla. 93, 233 P. 477;

BOEDER v. TAGGATZ,
187 Minn. 337, 245 N.W. 428;

OVERHOLT v. BURBRIDGE,
28 Utah 408, 79 P. 561;

MELTON v. UNITED RETAIL MERCHANTS,
44 Wash. (2d) 145, 163 P. (2d) 619.

The Supreme Court of Florida has recognized this general doctrine in the following cases in which it was held that, although a contract with a county was invalid, still when the contract was executed and the services performed, the person performing the services was entitled to be paid the value thereof:

WEBB v. HILLSBOROUGH COUNTY,
128 Fla. 471, 175 So. 874;

SMITH v. DAFFIN,
115 Fla. 418, 155 So. 658;

SMITH v. JACKSON COUNTY,
129 Fla. 787, 176 So. 858.

In the light of the above authorities, since the contract was completely executed, even if it had been an illegal contract, the respondent would still be entitled to recover his share of the profits on the specific written agreement between the parties. Therefore, the alleged original invalidity of the oral partnership agreement between the parties has become completely immaterial.

Since the original oral partnership agreement has been fully executed, it makes no difference whether or

not it was invalid under the federal statute on account of an alleged violation of the rule of a stock exchange. The right to recover on the account stated is purely a matter of state law. This means that no reason exists for the federal statute in question to be interpreted by the court. Consequently, no federal question necessarily exists and it is submitted that the petition for writ of certiorari should be denied.

POINT C.

EVEN IF A FEDERAL QUESTION IS INVOLVED, IT IS NOT A QUESTION OF ANY SUBSTANCE, AND THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR GRANTING A WRIT OF CERTIORARI.

The amount involved in this cause is $18,700.00, plus interest thereon at 6% per annum from October 1, 1945. This is not a substantial amount in dollars and cents. The question involved is likewise not an important one from the standpoint of human rights or property rights. No important precedent is involved since similar questions are not likely to arise with any degree of frequency. If a case of this kind should arise it could be very easily handled by lower courts without requiring the attention of the highest court in the land.

In the complex society of today, many vital questions of law arise with reference to fundamental human liberties, property rights and constitutional limitations. There are no special or important reasons why the time of the court should be consumed with a small, ordinary run of the mill case like this one.

POINT D.

THE FEDERAL STATUTE RELIED UPON BY PETITIONER DOES NOT RENDER INVALID A CONTRACT MERELY BECAUSE THE CONTRACT IS CONTRARY TO A RULE OF A PRIVATE STOCK EXCHANGE.

Petitioner contends that the oral partnership contract between the parties violated a rule of the New York Stock Exchange, and that it was, therefore, void under the provisions of 15 U.S.C.A., Section 78cc. In reply to this contention respondent states that the provisions of 15 U.S.C.A., Section 78cc do not have the effect of making a contract void even if the contract does expressly violate a rule of a private stock exchange.

15 U.S.C.A., Section 78, sets up, in Section 78d, an official body known as the Securities and Exchange Commission, and said law, in Section 78w, gives the Securities and Exchange Commission the power to make **rules and regulations.** 15 U.S.C.A., Section 78f-(a), in sub-paragraphs 2, 3 and 4, refers to **rules** of a private securities exchange or stock exchange. It is to be noted that with reference to the Securities and Exchange Commission the expression used is "rules and regulations", while with reference to a private exchange the rules are referred to as "rules of the exchange", and the word "regulation" is not used.

15 U.S.C.A., Section 78f, in speaking of the registration of private securities exchanges, in Sub-Sec. (a)(3), states:

> "Copies of its . . . rules . . . which are hereinafter collectively referred to as the 'rules of the exchange'."

From the above language it clearly appears that when Congress means to refer to the rules of a private stock exchange, such as the New York Stock Exchange, it uses the language "rules of the exchange".

It is to be borne in mind that the Securities and Exchange Commission is an official body set up by Act of Congress, while a stock exchange, such as the New York Stock Exchange, is a private body. We believe that the Act itself clearly shows that a contract is not invalid merely because it violates the rules of a private stock exchange.

15 U.S.C.A., Section 78cc, relied upon by petitioner, reads in part as follows:

> "(a) Any condition, stipulation, or provision binding any person to **waive** compliance with **any provision of this title or of any rule or regulation thereunder,** or of any **rule of an exchange** required thereby shall be void."

> "(b) Every contract made in **violation** of **any provisions of this title** or of **any rule or regulation thereunder,** and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made, the performance of which involves the **violation** of, or the continuance of any relationship or practice in violation of, **any provision of this title** or **any**

rule or regulation thereunder, shall be void . . . " (Emphasis ours).

From the above quoted language it appears that a stipulation to **waive** compliance with (1) "any provision of this title or of any rule or regulation thereunder", or (2) "of any rule of an exchange", would be void under sub-paragraph (a); while under sub-paragraph (b) a contract would be void if it **violates** "any provisions of this title or of any rule or regulation thereunder". We would like to impress most emphatically upon the court's attention that sub-paragraph (a) with reference to **waiver** uses the language "any rule of an exchange", while sub-paragraph (b) with reference to a contract made in violation of certain rules and regulations carefully omits the language "any rule of an exchange". Furthermore, when the Act refers to rules of the Securities and Exchange Commission, it uses the language "rules and regulations", as hereinabove set forth, while the rules of a private stock exchange are, by the express provisions of the Act, referred to as the "rules of the exchange". Certainly Congress, by using the language "rule of an exchange" in sub-paragraph (a) with reference to waiver, and omitting these words in sub-paragraph (b) with reference to contracts, very clearly meant that a contract violating a rule of a private stock exchange would not be invalid, although a binding stipulation to waive compliance with any rule of a private stock exchange would be invalid.

We therefore most sincerely urge for the Court's consideration that the contract of partnership, even if it violated a rule of the New York Stock Exchange, was not invalid. No rule of the Securities and Exchange Commission has been violated.

Petitioner further contends that, if the oral partnership contract between the parties was not void because of an alleged violation of a rule of a private stock exchange, it was void because the partnership contract itself constituted a stipulation binding a person to waive compliance with a rule of a private stock exchange under the provisions of sub-paragraph (a) of 15 U.S.C.A., Section 78cc. In answer to this contention, the respondent states that the parties did not enter into any stipulation or provision to waive compliance with any rule of the New York Stock Exchange. Even if the contract or partnership violated a rule of the New York Stock Exchange, this contract or partnership was certainly not a stipulation to waive compliance with any such rule. There is a vast difference between a contract and a waiver.

If a contract is a waiver, then every illegal contract which violates the law waives compliance with the law and is therefore valid. Suppose that it should be illegal to make a contract to perform certain services on Sunday, and suppose two parties make a specific written agreement calling for the performance of certain services on a Sunday and on that Sunday only. Under the law this contract would be invalid. However, if a contract in violation of law is a waiver of the law, then both parties waived compliance with the Sunday closing law by the very contract itself, and therefore the contract would be enforceable by reason of the waiver although it was illegal and invalid.

There are many authorities showing that a contract and a waiver are two different things, and the Supreme Court of the United States has so held. In the case of STANGE v. UNITED STATES, 282 U.S. 270, 51 S.Ct. 145, 75 L.Ed. 335, at page 339, the Court stated:

> "A waiver is not a contract and a provision requiring the Commissioner's signature was inserted for purely administrative purposes and not to convert into a contract what is essentially a voluntary unilateral waiver of defense by the taxpayer."

In the case of BERTELSEN & PETERSEN ENGINEERING CO. v. UNITED STATES, 60 Fed. (2d) 745, at page 747, the Court defined a waiver as "the intentional relinquishment of a known right and not a contract". At 67 C.J. 291, the author defines a waiver as "the voluntary abandonment or surrender by a capable person of a right known by him to exist with the intent that such right shall be surrendered and such person forever deprived of its benefit".

Under the aforementioned provisions of sub-paragraph (a) of 15 U.S.C.A., Section 78cc, a binding stipulation to waive compliance with a rule of a private stock exchange would be void, but in the light of the authorities hereinabove cited, no such binding stipulation to waive such compliance took place in the within cause.

A private stock exchange may adopt any number of rules concerning its employees, even though such rules cover small trivial details. Surely, it is not reasonable to assume that every contract which might incidentally violate some small, trivial, inconsequential rule of a private stock exchange is therefore necessarily void. Our law favors freedom of contract. Parties who are sui juris may contract as they see fit, and the contract will be upheld, provided that it does not violate an express provision of law or public policy. Therefore, anyone attempting to in-

validate a contract has the burden of showing that it is clearly invalid. All doubt should be resolved in favor of the validity of the contract.

The petitioner cites the case of WEIL v. NEARY, 278 U.S. 160, 49 S.Ct. 144, 73 L.Ed. 243 for the proposition that a rule of court has the force of law. From this case petitioner draws the conclusion that a rule of a private stock exchange has the force of law under the Securities Exchange Act of 1934. In the Weil case the court held that a contract between the attorney for the petitioning creditors of a bankrupt and the counsel for the trustee in bankruptcy for a division of fees was void because it violated the express provisions of a court rule.

In the Weil case the court, at 73 L.Ed. 248, stated that many abuses had occurred in the bankruptcy practice and pointed out as one of these the practice whereby the attorney for the petitioning creditors became attorney for the trustee, when this might involve a conflict of interest. The Weil case is very different from the case at bar. A court is an important, official, government body, and its rules for the government of its own officers should have the force of law.

The Securities and Exchange Commission is a public body, but the New York Stock Exchange is a private body which does not have law making power. No cases have been found or cited holding that the rules of a private body, as distinguished from a court or official body, have the effect of law. It would indeed be a dangerous policy to delegate to a private business the power to make rules which would have the effect of laws.

Petitioner takes the further position that if the partnership contract is not void for violating a federal statute it is void for contravening public policy. Petitioner alleges as a basis for jurisdiction that a "right privilege or immunity is specially set up or claimed under * * * statutes of * * * the United States", in accordance with Title 28 United States Code, Section 1257. Respondent's reply is that if the partnership contract is not void under a federal statute this Court has no jurisdiction even if the contract should contravene public policy. It is not a basis for jurisdiction in certiorari to a state court that a contract contravenes public policy. Questions of public policy in such cases should be finally determined by the state court.

Furthermore, the partnership contract did not contravene any principle of public policy. There was no fraud, concealment, overreaching or dishonesty. Respondent made large profits for petitioner.

This Court has held a number of times that it is only in clear cases that contracts will be held void as contravening public policy, that the principle must be cautiously applied to guard against confusion and injustice, and that detriment to the public interest will not be presumed where nothing sinister or improper is done or contemplated. Among the cases so holding are the following:

STEELE v DRUMMOND,
275 U.S. 199, 48 S.Ct. 53, 72 L.Ed. 238, 240;

TWIN CITY PIPE LINE CO. v. HARDING GLASS CO., 283 U.S. 353, 51 S.Ct. 476, 75 L.Ed. 1112, 1116;

A. C. FROST & CO. v. COEUR D'ALENE MINES CORP., 312 U.S. 38, 61 S.Ct. 414, 85 L.Ed. 500, 506.

It is therefore submitted that the partnership contract did not violate any federal statute and is not void, that it did not contravene any principle of public policy and that, even if it contravened public policy, this Court would still have no jurisdiction.

CONCLUSION

In conclusion it is respectfully submitted that this Court has no jurisdiction since no right, privilege or immunity under any federal statute is necessarily involved. Even if the Court has jurisdiction it is clearly apparent from the record that no error has been committed by the state court. The partnership contract was not void but even if it was void respondent was entitled under general state law to recover on the account stated between the parties. Furthermore, this is an ordinary, small run of the mill case and there are no special or important reasons for granting a writ of certiorari.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 269

ELIZABETH ROSPIGLIOSI,

Petitioner

vs.

DUDLEY J. CLOSHER,

Respondent

PETITION FOR REHEARING UPON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA AND SUPPORTING BRIEF

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